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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 365

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,

VS.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

REVISED BRIEF FOR PETITIONER.

EDWARD J. WHITE,
of St. Louis, Mo.,
THOMAS HACKNEY,
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of Kansas City, Mo.,
Counsel for Petitioner.

(36179)

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OPINION BELOW.

The opinion of the Supreme Court of Missouri (R. 19-34) has not yet been officially reported, but, since the filing of the application for the writ, has been published in *David* v. *Missouri Pacific R. R. Co.*, 41 S. W. (2nd) 179.

WRIT GRANTED ON TIMELY APPLICATION.

1. On October 26, 1931 (R. 235), this court granted its writ of certiorari herein.

2. The judgment of the Supreme Court of Missouri rendered June 24, 1931 (R. 219), affirming the judgment of the trial court, became final on denial of appellant's (petitioner's) motion for rehearing and motion to transfer to the court *en banc* on July 28, 1931 (R. 234). The Supreme Court is the highest court of the state in which a review of the judgment below could be had.

3. The petition for the writ with supporting brief and proper printed copies of a duly certified transcript of the record and proceedings below, were duly filed in this court September 8, 1931. Notice of the filing of the petition, together with a copy of the petition, printed record and supporting brief, were duly served by petitioner upon counsel for respondent, within ten days after the filing thereof, and due proof of service of such notice was filed with the clerk of this court.

GROUNDS FOR JURISDICTION OF THIS COURT.

(a) The respondent brought this suit under the Federal Employers Liability Act U. S. C. Tit. 45, Sec. 51, to recover damages for injuries growing out of the death of her husband, an employee of the petitioner while both were engaged in the work of interstate commerce.

(b) The trial court and the State Supreme Court held that the evidence was sufficient to show that petitioner was negligent and was liable under the Act, and sustained an award of damages to respondent therefor. In both courts petitioner challenged the sufficiency of the evidence to show any negligence or liability on its part under the Act.

(c) The rights and obligations of petitioner depend on that Act and the applicable principles of the common law as interpreted by the federal courts. The kind or amount of evidence required to establish liability and the rules applicable to such evidence are not subject to control of the several states.

(d) The rule is well settled that a federal question is thus presented and that this court will, on certiorari, examine the record, and, if it is found as a matter of law that the evidence is not sufficient to sustain the finding that the carrier was negligent and that this negligence was the proximate cause of the injury, the judgment against the carrier will be reversed.

Chicago, M. & St. P. R. Co. v. *Coogan*, 271 U. S. 472, 474 and cases cited.
St. L. & S. F. R. Co. v. *Mills*, 271 U. S. 344.

QUESTIONS PRESENTED.

The questions presented by the petition for the writ, and now before this court on certiorari for its determination are these:

1. Whether in an action under the Federal Employers Liability Act against petitioner, an interstate carrier, brought by the legal representative of a deceased employee, David, an armed train rider who was shot and killed by a train robber while the deceased and another train rider were protecting an interstate train from theft of merchandise thereon, the petitioner was liable for the death of the said deceased on account of not having warned him of that particular intended train robbery. Or, whether the risk of such injury had been assumed by the deceased, an experienced train rider and guard who had been warned of the activities and dangerous character of a gang of train robbers on petitioner's trains, and of the likelihood that train robberies would occur at any time and place, and had been instructed to keep constantly on the alert and to shoot to kill if necessary to protect himself from injury, and had been furnished a loaded automatic revolver and a sawed-off shotgun, loaded with buckshot and had agreed at the time of his employment to cope with such train robbers and was thus armed at the time of his fatal injury.

2. Whether the applicable law of assumed risk was correctly declared by the Missouri Supreme Court in its opinion (R. 230) thus:

> "Although David knew, appreciated and assumed the dangers incident to his employment, it was notwithstanding the continuing duty of his employer to exercise ordinary care to minimize or obviate them."

3. Whether one McCarthy, a known member of an active gang of train robbers and car thieves who, for an agreed compensation, to be paid him by petitioner, secretly agreed to furnish petitioner's Assistant Special Agent Boullt with such advance information as he, McCarthy, by continuing to consort with them, might obtain of this gang's intended robberies of trains of petitioner whenever he could do so with safety and without uncovering himself to his gang—he, McCarthy, to employ his own means, methods and time in obtaining and using this information, all without control of petitioner—was an independent contractor for whose acts or omissions petitioner was not liable. Or whether said McCarthy thereby became the agent or servant of petitioner, so that his uncommunicated knowledge of an intended train robbery was imputed to petitioner and a duty thereby cast upon petitioner of warning David of the particular time and place when this intended train robbery would occur.

4. Whether said McCarthy, if deemed the agent or servant of petitioner, was the sole judge of whether he could or could not with safety and without uncovering himself, telephone petitioner's special agent, Boullt, and advise him of this intended robbery. If not, then whether the evidence was sufficient to prove that McCarthy was negligent in not so advising said Boullt.

5. Whether the secret efforts of petitioner to obtain from McCarthy advance information of intended train robberies, all done without David's knowledge, and without promise to furnish him such information,

rendered the furnishing of such information to David a duty on petitioner's part.

6. Whether, if petitioner was charged with the knowledge which McCarthy had of the intended train robbery, though uncommunicated to petitioner, the failure of petitioner to warn David of the time and place the particular, intended robbery was to be attempted, was, under the evidence, the proximate cause of his death.

7. Whether the evidence was sufficient to show any negligence on the part of petitioner in discharging the duty which it owed to David.

STATEMENT.

This is an action brought under the Federal Employers Liability Act (U. S. C. Tit. 45, Sec. 51), for damages on account of the fatal shooting by Bert Gladson, a train robber, of James Lee David, a train rider for petitioner, while deceased and another train rider were protecting and guarding an interstate train then at Leavenworth, Kansas, on the early morning of May 17, 1923. The respondent is his widow and the administratrix of his estate. The suit was instituted and a trial was had in the Circuit Court of Jackson County, Missouri. On the trial before a jury, respondent recovered a verdict and judgment for $15,000 (R. 1) whereupon, after unsuccessful motions for new trial and in arrest of judgment, petitioner duly appealed to the Supreme Court of Missouri (R. 2) where the judgment was affirmed (R. 219).

It is not disputed by respondent that David was experienced in the character of work in which he was engaged when killed, and that he had been fully armed and warned at the time of his employment of the danger of his work, particularly of the danger of attempts of this same gang of thieves to rob his train; and also that he had observed and appreciated these dangers in his own experience during his employment.

The respondent's contention is that David should have been specially warned by petitioner that Gladson and others intended to attempt to rob his train at the particular time and place when the fatal shooting oc-

curred. This contention is based on the claim that one McCarthy, a member of the same gang of thieves as Gladson, had advance information of the intention of Gladson and others to rob this train at the time and place in question, and that under an arrangement between petitioner and McCarthy the latter had agreed to furnish petitioner with advance information of such contemplated robberies. Respondent contends that this knowledge of McCarthy, though uncommunicated to petitioner was *imputed* to the latter, and that thereby a duty was cast upon petitioner to give David such special warning, or to have protected him against Gladson.

The petition (R. 3) averred:

> "That at some time prior to said 17th day of May, 1923, the defendant in its special agents or police department *negligently* and *wantonly* employed a certain person as an *informant* who was *known by the defendant* at said time to be an *ex-convict*, a *thief* and *robber* who *consorted with thieves, robbers, murderers and other desperate persons* and that defendant instructed said informant to *continue to consort* with thieves, robbers, murderers and persons of desperate character, and to *learn of their plans* and designs, especially with reference to theft or robbery of property of defendant or in its possession and further instructed said informant that whenever he should learn of any proposed robbery or theft of or from the defendant, that said informant should report such fact to defendant *to the end that such thieves or robbers might be interrupted and apprehended.*"

It further averred in substance that said informant at some time before the date of the fatal shooting learned of the intention of certain well known thieves and robbers to rob defendant's train at Leavenworth, Kansas, in the early morning of May 17, 1923. That said informant, the *agent* of defendant, accompanied said thieves to Leavenworth well knowing their design and intent, and that they were armed with firearms and were desperate characters and would take human life in order to accomplish their purpose or to protect themselves if interfered with, and knowing that train riders on the train would be subjected to the hazard of an encounter with said desperate persons and that said informant went with said persons and remained with them until the fatal shooting of David. That defendant through its agents and employees knew of the contemplated robbery in time by the exercise of ordinary care to have frustrated and prevented the same and to have offered protection to said David, and to have warned him of the proposed robbery so that David could have protected himself; that defendant negligently and carelessly failed so to do and as a result David was killed.

The answer (R. 8) consisted of a general denial and a plea of assumption of risk by the deceased.

The only testimony produced on the trial as to McCarthy's employment as an informant and what and how the petitioner expected to obtain from him information was contained in the depositions of R. S. Mitchell, Chief Special Agent of petitioner (R. 11) and W. H. Boullt, Assistant Chief Special Agent (R. 33),

which said depositions were taken on behalf of, and introduced in evidence by, respondent.

In Mr. Mitchell's deposition (R. 16-18) the reasons for his undertaking to obtain secret information from McCarthy, the situation confronting the railroad at the time, and the nature of the information sought are given fully. In brief, his testimony showed that the Missouri Pacific was at the time being harassed and robbed by an organized gang of thieves in and adjacent to Kansas City; that he learned that McCarthy was a member of this gang and would, for a consideration, "be an informant, or 'snitch,' as it is usually called in thief parlance." He testified (R. 17):

> "I arranged with him to keep us informed as to the activities of this gang, to give us advance information if possible when this gang planned to rob our trains, and further arranged with him in the event he could not get to us, couldn't give us advance information, to give us information then as to the 'fence,' where the stuff was taken, as well as who was in the robbery, and all the details possible."

He testified further that he introduced McCarthy to Boullt and arranged with McCarthy to report to Boullt and to make his reports by telephone; that the matter was then turned over by him, Mitchell, to Boullt, and to no one else, for handling with McCarthy. He further testified (R. 29) that his sole purpose in so employing McCarthy was to get information of the activities of this bunch of thieves who had been robbing box cars; that he did not authorize McCarthy to carry a gun nor do any act of apprehending any person or

do any criminal act; that McCarthy was simply to get information; that he was not to stage any robberies, but was simply to continue trailing with these thieves. That after the killing of David, McCarthy assisted in convicting Gladson, who is now serving a life sentence for shooting David.

The testimony of Mr. Boullt with respect to the employment of McCarthy, the reasons therefor, and the activities expected of him, was in line with the testimony of Mr. Mitchell.

On being interrogated as to McCarthy's instructions (R. 41) he said:

> "Well, we couldn't very well give him *instructions*. He was a man to furnish us with *information* where these robberies were committed, who was committing them, and if he could get to us in time, to tell us before the robbery was committed; if not, to tell us what had become of the goods.
> Q. Well, what was the plan and arrangement with respect to whether or not he was to go with this gang on their robbing expeditions?
> A. He was to continue the same as he had, to get information; that is generally *up to the man's own idea*, that is working. * * * His instructions were that he was to get us word before the robbery was committed if he could; if not, to give us information as soon as he could after the robbery had been committed. He was to report this information to myself. I advised him to reach me through the telephone."

Further on he testified (R. 42):

> "Q. Now, you say if it was 'possible' McCarthy was to give you this information in advance of the robbery?

A. If he could, yes, sir.
Q. By 'possible' do you mean if he could do that without letting the gang know he was giving the information?
A. Why, *he would have to use his own judgment about that.* You see *we could not tell him how to use this information.* * * *
Q. But I understand he was to notify you if he could without *tipping off the gang* that he was giving notice?
A. That is right."

This witness further testified (R. 43):

"Q. As to his *ways* and *means* and *methods* of securing this information for you with respect to who this gang was, *when they were robbing you,* and if they had robbed you, what became of the goods, *you left that largely to the discretion of McCarthy.*
A. Yes, to furnish us the information."

The witness then detailed numerous reports of intended robberies made by McCarthy to him, and testified that on preparing to meet the intended robberies, the thieves failed to appear. Asked with regard to the attempted robbery at Leavenworth, in which David was killed, witness said that he first learned of it by getting a telephone call the morning after David was killed. Asked if McCarthy had made any report of this intended robbery prior to its occurrence, he said he had not (R. 49).

He further testified (R. 52) that the first report he had from McCarthy was about 7 o'clock the next morning; that later he had a conversation with McCarthy at the office of witness in Kansas City. He was then asked by respondents' counsel:

"Q. What report did McCarthy make to you in respect to this robbery or attempted robbery?
A. He gave me all the information, who killed David, how it happened and he went to Leavenworth with me to make the report to Mr. McNaughton, the county attorney.
Q. What information did he give you as to who the gang was, where they started from, where it was organized and when the robbery was planned?
A. It started at Kansas City; they drove to Leavenworth in Lawrence Hayes' car, Bert Gladson, Red Loar, Lawrence Hayes and McCarthy.
Q. What did McCarthy say with respect to whether he went over from the automobile to the train armed with a gun or crow bar or other implements?
A. He said he was given a gun by Bert Gladson.
Q. He carried the gun?
A. Yes, sir."

(The following questions and answers in the deposition were then by plaintiff's counsel withdrawn and not read to the jury, but were later (R. 60) offered by defendant but were excluded by the court:)

"Q. What did McCarthy tell you in respect to when they arranged or planned this robbery?
A. That afternoon very late they were riding down Minnesota Avenue and were near the bluff, near the C-G-W Bridge and seen a train coming over to Atchison and Lawrence Hayes made the remark, he says 'there is a good train, let's make it,' and they went back up the street.
Q. Who all was in the gang at that time, did he say?
A. Lawrence Hayes, McCarthy and some other fellow, I forget his name, there was three of them in it. They went back up the street and picked up Bert Gladson and then got Red Loar, then

drove up to a drug store, and McCarthy got out and went in and tried to get a telephone to call me, then this bunch came in on him and that then he bought a rubber doll—I won't say a rubber doll, a doll for his baby, to throw them off, then he wanted to go home to change his clothes in order to call me but they wouldn't let him do it.

Q. At what hour in the afternoon did he say it was when Lawrence Hayes suggested they make the train?

A. I could not tell you exactly; the train was coming across the Kaw River then, they had been riding around together over in Kansas.

Q. Did he say about what hour that was when that occurred?

A. No, he didn't just exactly say what hour.

Q. Did he say he had made any other attempts to communicate with you before this robbery was pulled off?

A. He said he did not have any other chance to do it, only two attempts he made when he went into the drug store and then tried to get them to let him go home and change his clothes."

Mr. Boullt further testified, (R. 56) that McCarthy was to report to no one but him, Boullt. He further testified (R. 57):

"Q. As I understand you, McCarthy was not to report an intended robbery to you unless he could do it without letting the gang know that he was so reporting?

A. Not so he would uncover himself.

Q. So they would get on?

A. Yes.

Q. Was McCarthy instructed to instigate any robberies in order to lead the gang into a trap?

A. No, sir."

The only other evidence of the time and place of the planning of the robbery and of what occurred between that time and the time of the fatal shooting was that offered by the plaintiff below in the depositions of Gladson and Hayes, taken in the Lansing State Penitentiary, where each was serving a sentence under conviction for the killing of David.

Gladson testified that the gang, including McCarthy, were on the 16th day of May, hanging around the courthouse in Kansas City, Kansas, listening as spectators to the trial of one Hogie Ward, who was then being tried for the pay roll holdup of Wilson & Co. (R. 62); that at along about noon of that day he had some talk with McCarthy about robbing the Missouri Pacific box cars at Leavenworth that night (R. 63). Asked whether any plan or arrangement was made at noon to commit this robbery, he answered (R. 63):

> "A. Why all the boys what belonged to the gang was supposed to go down to Riley's house right after the trial. * * * Then they was going to make arrangements to try to get two cars to go up; some of the boys didn't want to come up."

He further testified (R. 66) in substance that the gang left the court room about six in the evening and went to Riley's house; that there were two car loads of them. Asked further about their plan, he testified (R. 67):

> "Why we consulted all of us down there, and some of them didn't want to go so we who did want to go—it was I and McCarthy and Lawrence

Hayes and Charles Masterson, four of us started and made it up to go that night about six-thirty or something like that. * * * I had a date with a girl that night so I wanted to go up and see and put it off and Charles Masterson had to go to see the doctor so Lawrence Hayes and McCarthy and I and Masterson went up to Wyandotte and I got off at 10th and Central and Masterson went up to the doctor's office so I made a date with him to meet me as he was going back. * * *

Q. To meet you where?

A. At 10th and Central.

Q. Where were they going?

A. To the doctor's office, and then go down to see this freight go through (Kansas City, Kansas) *and see what was on it.*

Q. Where did they say they were going to see the freight, to what street or crossing?

A. It foots there at 3rd and Minnesota.

Q. What was the purpose of going down to see the train as it went through?

A. Why mostly to see if there was *any good merchandise on it.*"

The testimony shows that McCarthy was with some of the gang all the time from when they first discussed the matter of robbing the Missouri Pacific train until about 8 o'clock that night (R. 122).

Hayes testified, that McCarthy got out of Hayes' car and said he was going to the drug store; that witness saw McCarthy go into the drug store, and in a few minutes witness stopped his car directly across from and in front of the drug store; that witness and Masterson then joined McCarthy in the drug store. Asked what McCarthy was doing when he got in the drug store witness answered (R. 124):

"Why I don't know, I guess he was looking around the place. I don't even know what he went there for. I guess he wanted a drink or something. But he was not drinking when we got there. He joined us in a drink."

Witness then testified that afterwards they went from the drug store and picked up Gladson; that Masterson did not accompany them; that they went to the foot of Minnesota Avenue where a freight train was pulling in and they got out of the car and watched the freight train go by; that after picking up Gladson and Loar, they went to the home of McCarthy; that McCarthy went onto the front porch and got a pair of overalls and a jumper he had there (R. 126) and that while he did so, the witness and others stopped in the street *where they could see McCarthy all the time* (R. 127).

Testifying further as to the arrangement to rob the particular train that David was guarding when killed, Hayes said (R. 154):

"Q. The talk you had with McCarthy when you started out was that you were going to rob some box cars, you didn't know just what box cars you were going to rob?
A. He suggested the Missouri Pacific himself.
Q. He suggested that to you but you had not made any plan to rob any *particular train* until you started from Riley's house?
A. Until we went down to the foot of Minnesota Avenue, we *didn't know we were going to rob that train then.*"

There was no evidence tending to show that McCarthy had any opportunity after the robbery had

been planned to withdraw himself from the other members of the gang and go to a telephone and communicate information of the intended robbery to Boullt. The only attempt to show such opportunity was by the testimony of Hayes as to McCarthy's going into the drug store after stating his intention to go there, and of Hayes having observed him going into the drug store and, kept surveilance over his movements then until he and Masterson joined McCarthy.

There was no evidence that there was *any telephone* in the drug store, *nor*, if *one was there*, that McCarthy had the *privilege* or *opportunity to obtain access to it*, and communicate with Boullt before Hayes and Masterson joined him in the drug store.

It was affirmatively shown that when McCarthy afterwards went to his own home to get a pair of overalls and a jumper (R. 126), Hayes stopped his car in such position, that, as he expressed it (R. 127), "*We could see him all the time.*"

No explanation was given by Hayes as to why he was keeping such close watch on McCarthy's movements.

Hayes further testified on cross examination (R. 152-153) that he participated in the train robbery at Nearman, Kansas, between Kansas City and Leavenworth, of this same train about a month before David was killed, in which robbery Masterson was shot; that the "bulls" (train riders) did the shooting; that Gladson and Masterson were armed; that McCarthy was not with them that night. He further testified (R. 139)

that on the night of May 2nd, about two weeks before David was killed, he, Hayes, participated in a robbery of the same train at Wolcott (between Kansas City and Leavenworth); that Bert Gladson, Red Loar, George Riley, Hobert Ward, Freddie Thompson, John Rock, Sonny Davis, George Oftener and himself participated in that robbery; that they had two automobiles and robbed most of the whole train; that they held up the brakeman and made him stand still at the road crossing while they robbed the train; that they loaded the stuff into the trucks and got away.

Sophia David, the widow, testified (R. 172-176) that her husband worked for a coal company during a strike in Kentucky several years previously, his work being that of looking after the place for others, where they had a machine gun with a headlight on top of the building; that from 1911 to 1915 her husband was employed by the Pinkerton Detective Agency as a guard walking a beat for them in Kansas City, and that he was armed at the time of such service. Further, that during the time he was working for the Missouri Pacific he had in his possession and carried a *revolver* and a *sawed-off shotgun.*

L. Q. Moore, a witness for defendant, testified: That he was a special agent for the Missouri Pacific (R. 178 *et seq.*) and to his having become acquainted with David in Kentucky where David worked for him a few months in 1907 or 1908 during the coal strike, during which time David was armed and on one occasion David had kept another man from shooting him, Moore; that he next saw David on December 18, 1922,

and talked with him regarding a job on the Missouri Pacific. David wanted a job as special agent or train rider if such a job was open; that arrangements were then made for David to meet Mr. Barber, another official of the Missouri Pacific, whereupon he took him to Barber with a view of such employment, and conversation was had between Barber and David regarding his duties and the nature of the position; that Barber told David there was a lot of thieves on the road and he had a position open as a train rider; that they were having a lot of train robberies and said that there was a position open. He further said, "I want to know whether you will fight these fellows or not," to which David replied, "*I will fight them until I die.*" That thereupon arrangements were made for David to start to work; that David was provided with a .45 automatic Colt revolver and a sawed-off No. 12 shotgun, loaded with No. 1 buckshot; that David and another train rider named Boyd were assigned to riding trains between Kansas City and Leavenworth; that witness told David to be careful and look out for these fellows, and also gave him all the pointers he could.

> "Q. State what you said about the danger if any of dealing with these men.
> A. I told him they would shoot him just as quick as they saw him and to be careful—'be careful and watch your step,' is about what I said to him."

This witness further testified (R. 184) that during the time of David's employment in this work, until the witness left Kansas City, he saw David every morning

when he came in; that he had the sawed-off shotgun and revolver at all times.

C. M. Barber, Assistant Chief Special Agent of the defendant, occupying the place Mr. Boullt occupied prior to his death, testified (R. 192-201) that he was formerly special agent for defendant, his general duties being to employ men to guard the company's property in the capacity of special agent.

The witness testified to the circumstances of his employment of David and the nature of the work he wanted done. He testified (R. 194): "I told him (David) that we were having a great deal of trouble with a bad gang of train robbers robbing our trains en route, and that I was looking for a man of sufficient ability to cope with them—a man who was not afraid to cope with them and a man who would shoot and use good judgment and watch things, and if necessary to possibly kill them, and after I had gone over the matter thoroughly with him, he said 'I will take the job,' or words to that effect. * * * I explained to him that they had been robbing the trains en route, throwing the stuff out en route, and they were a large gang and a bad gang, that they were armed, all of them, and that all of them would shoot him on sight and that he had to be very careful about his own life."

He testified further (R. 195) that David was carrying a pistol and a sawed-off shotgun; that they were given him for the purpose of defending himself and the company's property * * * "there was a general instruction out to all our men to carry their arms anywhere they go, anywhere so they could get hold of

them, because they were told they would be liable to need them at any time."

The witness then (R. 195-196) detailed the circumstances of the train robbery at Wolcott about two weeks previous to David's shooting; that that was on the train David was to have ridden that night but which train David had left chasing some thieves in the Kansas City yards and the train pulled out and left him; he further testified that David was fully advised as to what occurred up at Wolcott that night, along with the other man; that Boyd usually rode this train with David; Boyd was armed with a pistol; he was not sure whether he carried a shotgun; that all train riders were supposed to carry flashlights with which not only to examine seals but to protect the train rider from hiding bandits between the cars. Asked if there had been any other attempts to rob the train other than this Wolcott robbery up to that time, the witness answered "Many, many." He further testified (R. 198) that prior to the killing of David, two of the Kansas City, Kansas, thieves, Loar and Gladson, had been tried and convicted of an Osawatomie, Kansas, robbery and were then out on bond.

The witness further testified (R. 199) that he did not advise other special agents, or train riders or anyone of the employment of McCarthy; that this employment was kept a secret; that it was not calculated to come to the knowledge of any of the company's employees outside of the heads who employed him. Witness further testified that he had no knowledge of the purpose of Gladson and others to rob this train before

David was killed; that he first learned of the killing early the next morning. He further testified on cross examination (R. 200) that he had never known McCarthy prior to the time David was killed nor come in contact with him at any time; that he had nothing to do with the employment of McCarthy.

On the trial the petitioner challenged the sufficiency of the evidence to establish liability on its part by asking at the conclusion of the plaintiff's evidence that the court give to the jury a peremptory instruction to find the issues in favor of the defendant. This request was denied (R. 178).

At the conclusion of all the evidence petitioner (R. 203) renewed its request for a directed verdict which was also denied.

SPECIFICATION OF ERRORS.

The Supreme Court of Missouri erred in its decision in the following particulars:

1. It erred in its ruling that although David was informed of the dangers and assumed the risk of injury therefrom, there was notwithstanding a continuing duty on the petitioner to minimize or obviate them.

2. It erred in not ruling that David, having been fully warned of the danger of combating this particular gang of thieves, and having agreed to cope with them and protect himself and petitioner's property against them, and having been heavily armed for that purpose, he thereby assumed the risk of being killed in so protecting himself and petitioner's property.

3. It erred in ruling that petitioner having fully warned David of the danger of coming into contact with this gang of car thieves, it was still petitioner's continuing duty to obtain advance information of intended robberies and to warn David of the particular time and place such attempts at robbery would occur.

4. It erred in ruling in effect that McCarthy's agreement with petitioner to furnish it with information of intended robberies constituted McCarthy the agent, representative or *alter ego* of petitioner so that McCarthy's knowledge of a contemplated robbery was imputed to petitioner though not in fact communicated to it.

5. It erred in not ruling that the ineffectual and gratuitous efforts of petitioner to secretly obtain from McCarthy advance information of intended robberies, all without David's knowledge, imposed no legal duty on petitioner to obtain such information and warn David thereof, and in not further holding that petitioner's failure to so obtain such information and warn David did not constitute actionable negligence.

6. It erred in not ruling that the evidence was insufficient to show liability on petitioner's part and that the trial court should have directed a verdict in its favor.

7. It erred in its ruling that the evidence was sufficient to support the verdict.

8. It erred in not reversing the judgment of the trial court.

POINTS, AUTHORITIES AND ARGUMENT.

I.

Under the Evidence and the Applicable Law as Interpreted by the Federal Courts, David Assumed the Risk of His Fatal Injury and Petitioner Is Not Liable for His Death.

In his contract of employment, David assumed the risk of being shot by a train robber in protecting petitioner's trains from robbery. He was employed and fully armed for this express purpose. He was fully apprised of all the dangers attending his work. He was experienced in that particular kind of work.

It is well settled in an unbroken line of decisions of this court and other federal courts, and of numerous state courts, that he assumed the risk of his fatal injury and that no recovery can be had against petitioner.

Boldt v. *Penna. R. Co.*, 245 U. S. 441, 445.

Toledo St. L. & W. R. Co. v. *Allen*, 276 U. S. 165, 168, 169.

Cudahy Pkg. Co. v. *Marcan*, (8th C. C. A.), 106 Fed. 645, 647.

King v. *Morgan*, (8 C. C. A.) 109 Fed. 446, 450.

Chi. G. W. Ry. Co. v. *Crotty*, (8th C. C. A.) 141 Fed. 913, 916.

So. Pac. Co. v. *Seley*, 152 U. S. 145.

Kohn v. *McNulta*, 147 U. S. 238.

Seaboard Air Line R. Co. v. *Horton*, 233 U. S. 492, 504.

Morey v. *Maine Central R. Co.*, 126 Me. 272, 133 Atl. 92.

Ashton v. *Boston & M. R. Co.*, 222 Mass. 65, 109 N. E. 820.

Meyers v. *W. C. DePauw Co.*, 138 Ind. 590, 38 N. E. 37.

A late expression of the rule by this court, which is in full harmony with the other cases cited, is found in *Toledo St. L. & W. R. Co.* v. *Allen, supra,* where this court said, *inter alia*:

> "And except as specified in Section 4 of the Act (45 U. S. C. A., Sec. 54), the employee assumes the ordinary risks of his employment, and when obvious, or fully known and appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employees."

In *Cudahy Packing Co.* v. *Marcan, supra,* Judge Sanborn, in discussing the effect of an assumption of risk by the servant, said, at page 647 of the opinion:

> "By entering upon and continuing in the employment, he assumes these risks and dangers, and no negligence can be charged to the master and no liability can be fastened upon him because he fails to give notice or warning of, or to remove these common risks of the employment."

In *Morey* v. *Maine Central R. Co., supra,* in discussing the assumption of risk by the servant, it is said:

> "Dangerous work must be performed; and work must be done in dangerous places, and when a workman makes a contract to do such work, or to work in a dangerous place, he contracts with reference to that danger and assumes the 'open and obvious risks incident to the work' or, as some times expressed, 'such dangers as are normally

> and necessarily incident to the occupation.' This is a contractual assumption of risk. *Ashton* v. *B. & M. R. Co.*, 109 N. E. 820; 222 Mass. 65, 69; *Seaboard Air Line Co.* v. *Horton*, 233 U. S. 492. With reference to risks and dangers covered by the contract the employer owes the employee no duty and so cannot be held guilty of negligence."

In *Meyers* v. *W. C. DePauw Co., supra,* the Supreme Court of Indiana, said:

> "The fact that the service is a dangerous one adds nothing to the liability of the master for injuries resulting from the natural and ordinary incidents of the undertaking."

II.

Petitioner Was Under No Legal Duty to Obtain Advance Information and Warn David of the Particular Time and Place Attempts to Rob His Train Were Contemplated.

The danger of coming into contact with thieves and train robbers while attempting to rob his train was one of the common, momentary and transitory risks of David's employment, of which he had been fully warned and had observed from his own experience. These risks inhered in the performance of his ordinary duties and were assumed by him. The only thing he did not know *was the precise time and place when and where this danger would exist.*

Neither in his contract of employment, nor, by the course of conduct of the parties thereafter, was David promised or given any reason to believe that he would be furnished advance information of attempts at robberies. He had no reason to expect, and did not expect, to receive such information.

Petitioner was therefore under no legal duty to keep watch over David and warn him that Gladson would attempt to rob the train at the time and place of the fatal shooting.

McCann v. *Kennedy*, 167 Mass. 23.
Ring v. *Mo. Pac. R. Co.*, 112 Mo. 220, 230.
St. L.-S. Ry. Co. v. *Mills*, 271 U. S. 344; 46 Sup. Ct. 520.
Atlantic Coast Line v. *Southwell*, 271 U. S. 654; 48 Sup. Ct. 25.
Lowrey v. *Atlanta Joint Terminals*, 145 Ga. 782; 89 Southeastern 832.
30 C. J. p. 502.
Manwell v. *Dourst*, 178 California 752; 174 Pacific 881; 1 A. L. R. 669.
Feaster v. *Southern Ry. Co.*, 15 Fed. 2d. 540.
Cudahy Pkg. Co. v. *Marcan*, (8 C. C. A.) 106 Fed. 645, 647.
Morey v. *Maine Central R. Co.*, 126 Me. 272; 133 Atl. 92, 93.

In *McCann* v. *Kennedy*, 167 Mass. 23, Mr. Associate Justice Holmes, while a member of the Supreme Judicial Court of Massachusetts, gave expression in concise terms to the underlying principle limiting the master's duty thus:

> "But the danger was momentary, and it would be impracticable to require employers to warn their men of every such transitory risk when the only thing the men do not know is the *precise time* when the danger will exist. *Flynn* v. *Campbell*, 160 Mass. 128, 130." (Italics supplied.)

In *Atlantic Coast Line R. Co.* v. *Southwell*, 275 U. S. 64, at page 65, Mr. Associate Justice Holmes, in denying the liability of the railroad company for the murder of one of its employees, said:

> "It would be straining the language of the act somewhat to say in any case that a willful homicide 'resulted' from the failure of some superior officer to foresee the danger and to prevent it."

In *Ring* v. *Mo. Pac. R. Co.*, 112 Mo. 220, at page 230, the court said:

> "It would be most unreasonable to require the master to keep special watch over every employee and warn him of every common danger to which he might be subjected in the performance of his ordinary duties, and the law does not require it."

The foregoing authorities, considered in connection with those cited under Point I of this brief, certainly demonstrate that the Supreme Court of Missouri in its opinion (R. 230) did not properly declare the applicable law of assumed risk when it said:

> "Although David knew, appreciated and assumed the dangers incident to his employment, it was, notwithstanding, the continuing duty of his employer to exercise ordinary care to minimize or obviate them."

If, as held by the court below, petitioner owed to David the duty of employing someone to ferret out in advance intended robberies and to communicate that knowledge to petitioner, so that it in turn might warn David, then by this same rule, the person engaged to ferret out the intended robberies (which in itself is an extremely precarious calling) would be entitled to like protection from some other person of petitioner's

procurement, and that person in turn would be entitled to similar protection and so on *ad infinitum.* There would, therefore, under this rule, be no end to the requirements of extra employments nor limit to the range of duty of the petitioner.

If the risk of a particular danger is once assumed by the servant then no negligence can be predicated against the master on account of the existence of the danger.

The rule was tersely expressed by Judge Sanborn in *Cudahy Pkg. Co.* v. *Marcan, supra,* where after holding that there had been an assumption of risk by the servant, he stated the effect thus:

> "* * * *and no negligence can be charged to the master and no liability can be fastened upon him because he fails to give notice or warning of, or to remove, these common risks of the employment.*" (Italics supplied.)

Likewise the Supreme Court of Maine well expressed the same rule in *Morey* v. *Maine Central R. Co., supra,* where it said:

> "With reference to risks and dangers covered by the contract, the employer owes the employee no duty and so cannot be held guilty of negligence."

Carried to its logical conclusion, the ruling of the court below would require the petitioner, after employing and arming David to protect its train from thieves, and obtaining from him an express agreement to cope with them, to still further employ some other person to go in advance of David and frustrate in-

tended robberies so as to prevent the thieves from coming into contact with him.

III.

The Ineffectual Effort of Petitioner, Voluntarily Undertaken Without David's Knowledge, To Do More In Anticipating Robberies and Obtaining Advance Information Thereof Than It Was Obliged To Do, Did Not Make the Furnishing of Advance Information Thereof To David a Duty On Petitioner's Part.

Regardless of whether McCarthy was the agent or servant of petitioner, or occupied a relation analogous to that of an independent contractor, petitioner was not legally responsible to David for the failure of McCarthy to communicate to petitioner advance information of the intended robbery in question.

David knew nothing of the arrangement with McCarthy, and neither by his contract of employment nor by anything done by petitioner thereafter did he have any reason to expect or believe that he would receive such advance information. Petitioner's efforts to so obtain and use such information were wholly gratuitous and did not flow from any duty imposed by the law. Hence, the petitioner's failure, from whatever cause, to obtain and warn David of this information is not actionable negligence.

St. L.-S. F. R. Co. v. *Mills*, 271 U. S. 344, 346, 347.

1 Sherman & Redfield on Negligence, (6th Ed.) Sec. 8, p. 13, also Sec. 10, p. 17.

In *St. L.-S. F. R. Co.* v. *Mills*, *supra*, Mr. Associate Justice Stone in denying liability in a case quite

similar in many of its features to the instant case, said, at page 346 of the opinion:

> "There was no evidence that petitioner had ever furnished decedent or any other employee with more than one guard in going to and from work, or any other evidence from which it could be inferred that petitioner had undertaken or held itself out as undertaking to furnish more protection to the decedent or its other workmen than it actually did furnish."

At page 347 he said:

> "The respondent here asserts that the defendant having assumed to do something should have done more. But the bare fact that the employer voluntarily provided some protection against an apprehended danger by undertaking to do something which involved no special knowledge or skill can give rise to no inference that it undertook to do more. Respondent therefore relies on a breach of duty which does not exist at common law and of whose genesis in fact it offers no evidence."

In Sherman & Redfield on Negligence, *supra,* at page 13, it is said:

> "If there is no duty there can be no negligence."

Again at page 17, the same authors say:

> "It is only the lack of such care or diligence as the law demands in the particular case which constitutes negligence."

Again the same authors say:

> "All duties of imperfect obligation imposed only by generosity, kindness, charity or even ab

stract justice but not by the law of the land, are necessarily excluded."

IV.

McCarthy's Uncommunicated Knowledge of the Intended Robbery Is Not Imputed To Petitioner. He Was Not Petitioner's Alter Ego, Agent, Servant or Representative.

The amended petition (R. 5) described McCarthy as a person "known by defendant to be an ex-convict, thief and robber, who consorted with thieves, robbers, murderers and other desperate persons." It charged defendant with having instructed him "to continue to consort with 'such thieves' etc."

The undisputed evidence showed that Mr. Mitchell, the Chief Special Agent and Mr. Boullt, Assistant Chief Special Agent of petitioner, simply made an arrangement with McCarthy, a known member of this gang of thieves, and who had recently been convicted of robbing one of petitioner's cars (R. 55, 71) whereby for an agreed compensation McCarthy promised to secretly furnish Mr. Boullt with such advance information as he, McCarthy, by continuing to consort with these thieves might obtain of their intended robberies of petitioner's trains, whenever he could do so with safety and without uncovering himself to his gang; that McCarthy was to employ his own *means, methods* and *time* in obtaining this information, and, in using and furnishing it to petitioner. He was at no time under or subject to any order, direction or control of petitioner. He was not to do any work for petitioner, but was to continue to ply his own private occupation of

thievery. He did not agree to enter generally into the service of petitioner and do whatsoever petitioner called upon him to do.

The sole effect of this arrangement was to obtain the promise of McCarthy to betray the confidence of his fellow criminals and to sell to petitioner for a consideration, information of their activities in perpetrating robberies against petitioner only. He was left free to keep secret their activities and his profits of depredations against the property of all others.

So far as the rights and liabilities of the respective parties in the instant case are concerned, it makes no difference whether McCarthy be called in underworld parlance "snitch," "stool pigeon," "squealer," or "informant," or whether his status be described in the more elegant nomenclature of "independent contractor," or "seller of secret information," or "betrayer of his fellow thieves." It suffices to say that while plying his vocation of thievery with the particular gang of thieves with whom he was associated, he was not in any sense the *agent* or *representative* of petitioner.

Thievery was not a business in which the petitioner could lawfully engage. Yet, it must be deemed to have been so engaged, if McCarthy was its agent or representative, in doing what he did.

The trial court (R. 203) was impressed with, and deemed the petitioner blameworthy because of the fact that it had sought this information from an "unworthy source;" that it ought to have engaged the services of a more "intelligent" and "trustworthy"

person. In other words, that petitioner ought not to have endeavored to use *a thief to catch a thief,* but should have employed for that purpose someone in *higher social standing,* who did not indulge in the occupation of thievery.

In selecting McCarthy as the instrument to obtain this secret, confidential information, petitioner had no choice of persons. The *delectus personae* was wholly lacking. McCarthy was the only one to be found who would betray the confidence of his fellow criminals.

Petitioner did not by the arrangement clothe McCarthy with any power or authority in its behalf to perform any duty which it owed to the public.

An agent is defined in 2 C. J. 420, to be one who acts for, or in the place of another, by authority from him, one who transacts some business or manages some affairs of another by authority and on account of the latter. He is a substitute, a deputy appointed by the principal with power to do the things which the principal may or can do. The business must be a lawful business.

McCARTHY WAS AT MOST AN INDEPENDENT CONTRACTOR:

2 C. J. p. 424, Section 10.
3 Words & Phrases, (3d Series) p. 206, title "Employee."
4 Words & Phrases, (3d Series) pp. 222, 229, title "Independent Contractor."
Casement v. *Brown,* 148 U. S. 615.
Metcalf v. *Eddy & Mitchell,* 269 U. S. 514, 520, 521.

In *Casement* v. *Brown, supra,* where Casement and Company had been employed to do certain work for the railroad companies, this court in holding them to be independent contractors and not servants of the railroads said:

> "The will of the (Railroad) companies was represented only in the result of the work and not in the means by which it was accomplished. This gave to defendants the status of independent contractors. * * * *They (Casement & Co.) did not agree to enter generally into the service of the companies and do whatsoever their employers called upon them to do but they contracted for only a specific work.*" (Italics supplied.)

In *Metcalf* v. *Eddy & Mitchell, supra,* in ruling that the plaintiffs below were not employees but were independent contractors, Mr. Associate Justice Stone at pp. 520, 521 said:

> "Nor do the facts stated in the bill of exceptions establish that the plaintiffs were employees within the meaning of the statute. So far as appears they were in the position of independent contractors. * * * In each instance the performance of their contract involved the use of judgment and discretion on their part and they were required to use their best professional skill to bring about the desired result. This permitted to them liberty of action which excludes the idea of that control or right of control by the employer which characterizes the relation of employer and employee and differentiates the employee or servant from the independent contractor."

In 2 C. J. Sec. 10, P. 424, the distinction between agent and servant on the one hand and independent

contractor on the other, and the liability or non-liability of the employer for their respective acts, is tersely stated thus:

> "The liability of an employer for the acts and contracts of one employed to work for his interests often turns on the distinction between agent or servant on the one hand and independent contractor on the other. For the acts of the agent or servant within the scope of his employment the employer is in general liable; for the acts of the independent contractor in general he is not. In so far as the employer retains the right of general control and management of the work, he makes the employee his agent or servant; but in so far as the employer leaves the choice of means and methods to the employee, he makes him an independent contractor."

V.

McCarthy Was the Sole Judge of Whether He Could With Safety to and Without Uncovering Himself to His Associates Telephone or Otherwise Advise Boullt of the Intended Robbery.

Mr. Boullt, a witness for respondent, when asked about McCarthy's instructions and plan of operations said (R. 41):

> "Well, we couldn't very well give him *instructions.* He was a man to *furnish us with information.* * * * That is generally up to the *man's own idea* that is working."

On page 41 inquired of about McCarthy's use of the information, he said:

> "*Why he would have to use his own judgment about that. You see we couldn't tell him how to use this information.*"

On page 43 respondent's counsel below asked this question:

> "Q. As to his *ways* and *means* and *methods* of securing this information for you with respect to who this gang was, *when they were robbing you,* and if they had robbed you what became of the goods, *you left that largely to the discretion of McCarthy?*
> A. *Yes, to furnish us the information.*"

In the very nature of McCarthy's situation this was a matter entrusted to his sole judgment and discretion. No one but McCarthy could know what surveilance was being kept by the gang over his movements. Hayes admitted that he saw McCarthy go into the drug store and that he (Hayes), stopped his automobile in front of the store and finally that he and Masterson followed McCarthy in (R. 123). After leaving the drug store, picking up Gladson and Loar, they went to McCarthy's house, where he got a pair of overalls and a jumper (R. 126); and while McCarthy was getting these articles, the witness and others stopped in the street *where they could see McCarthy all the time* (R. 127). Evidently McCarthy had some intimation from the gang that they were suspicious of him and that this was the real reason that several members of the gang (R. 171), including their leader, refused to go with him on the night David was killed. It should be remembered that McCarthy was not invited to the Nearman robbery nor the Wolcott robbery.

VI.

There Is an Entire Failure of Proof to Show That the Failure to Warn David of the Intended Attempt to Rob the Cars Had a Causal Connection With or Was the Proximate Cause of the Fatal Injury.

St. L. & S. F. R. Co. v. *Mills,* 271 U. S. 344.
Feaster v. *So. Ry. Co.,* 15 Fed. (2nd) 540.
Lowrey v. *Atl. Joint Terminals,* 145 Ga. 782.

VII.

The Jury Were Left to Conjecture, Speculation and Guess Work Owing to Lack of Evidence to Find:

First. Whether McCarthy made any efforts to communicate with Boullt.

Second. Whether McCarthy had any opportunity without uncovering himself to communicate with Boullt, so as to apprise him of the intended attempt to rob the cars.

There was no evidence that McCarthy had an opportunity to telephone to Boullt nor that there was any telephone in the drug store, nor, if there was one, that McCarthy had access to it. He was given no opportunity to use the telephone at his own home. The gang had him under observation all the while he was at each place.

Third. What David could or would have done and what the railroad company could have done to avert the shooting even though McCarthy had made

his report and David had been warned of the intended robbery,

It is respectfully submitted that the judgment below was for the wrong party, and that it should be reversed.

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